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COUNTRY GARDEN DANGA BAY SDN BHD v. TRIBUNAL TUNTUTAN PEMBELI RUMAH & ANOR

COURT OF APPEAL, PUTRAJAYA
HARMINDAR SINGH DHALIWAL JCA
YEW JEN KIE JCA
B NOR BEE ARIFFIN JCA
[APPLICATION NO: J-08-26-01-2019]
15 OCTOBER 2019

C ***ADMINISTRATIVE LAW:*** *Remedies – Judicial review – Appeal against dismissal of judicial review application – Whether leave of Court of Appeal required – Whether leave required where value of subject matter less than RM250,000 – Whether leave serves as filter against frivolous or unmeritorious proceedings – Practice directions – Whether compliance important – Whether issued to streamline court process – Whether judicial review allows courts to review administrative or* D *quasi-judicial decision by public authority – Whether more appropriate to consider if appeals meet test of real prospect of success rather than value of claim – Courts of Judicature Act 1964, s. 68(1)(a)*

CIVIL PROCEDURE: *Appeal – Leave to appeal – Appeal against dismissal of judicial review application – Whether leave of Court of Appeal required – Whether* E *leave required where value of subject matter less than RM250,000 – Whether leave serves as filter against frivolous or unmeritorious proceedings – Practice directions – Whether compliance important – Whether issued to streamline court process – Whether more appropriate to consider if appeals meet test of real prospect of success rather than value of claim – Courts of Judicature Act 1964, s. 68(1)(a)*

F The second respondent purchased a condominium unit from the developer ('applicant'). Upon delivery of vacant possession, the second respondent discovered that the unit he had agreed to purchase was not same as the one that was handed over to him. The second respondent complained to the applicant but to no avail. The second respondent therefore filed a claim with G the Tribunal for Homebuyer Claims ('first respondent') claiming that the applicant had delivered the wrong unit and therefore there was a breach of the sale and purchase agreement. The first respondent allowed the second respondent's claim. Aggrieved, the applicant filed a judicial review application against the decision but the application was dismissed by the H High Court. The applicant filed a notice of appeal against the High Court decision without first obtaining the leave of court. Hence the instant notice of motion seeking leave to appeal pursuant to s. 68(1)(a) of the Courts of Judicature Act 1964 ('CJA').

Held (striking out motion with no order as to costs)
I **Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:**

(1) Section 68(1)(a) of the CJA states that no appeal shall be brought to the Court of Appeal ('CA') when the amount or value of the subject matter

of the claim (exclusive of interest) is less than RM250,000, except with the leave of the CA. Where appeals are filed without leave having been obtained, and where leave is required, the court has no jurisdiction to hear the appeal. The requirement for leave serves as a filter against frivolous or unmeritorious proceedings. (paras 7 & 8)

(2) The CA Practice Direction No. 1 of 2017 explicitly provides that matters that do not require leave to appeal are, among others, *certiorari*. Practice directions are issued by the courts to supplement the existing rules and to regulate the procedural practice of solicitors in their dealings with the courts and in the filing of cause papers or documents. The creation and issuance of the practice directions are to streamline the court process and enhance efficiency of the same. Therefore, as long as the practice directions are not contrary to any written law, they must be complied with. (paras 13, 14 & 17)

(3) The cases concerning judicial review and *certiorari* should be considered on a different footing as it is an important process to review executive and legislative actions. It provides checks and balances which are imperative in the separation of powers. In this way, the courts could review an administrative or *quasi*-judicial decision by a public authority. The value of the subject matter as stated in s. 68 of the CJA 1964 was intended for cause of actions founded on tort or contract or other claims based on equity and not for matters concerning judicial review. Hence, the amount involved in administrative action is really irrelevant. If at all a filter is necessary to prevent frivolous or unmeritorious appeals, it may be more appropriate to consider whether such appeals meet the test of real prospect of success rather than the arbitrary threshold of the value of the claim. Therefore, no prior leave under s. 68(1)(a) of the CJA was required for the purpose of this appeal. (paras 19-21)

Case(s) referred to:

Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor [2002] 3 CLJ 357 CA ***(refd)***

Galaxy Energy Technologies Sdn Bhd v. Timbalan Pemungut Duti Setem, Malaysia & Anor [2011] 5 CLJ 829 CA ***(foll)***

Harcharan Singh Sohan Singh v. Ranjit Kaur S Gean Singh [2011] 3 CLJ 593 FC ***(dist)***

Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [2000] 1 CLJ 1 CA ***(dist)***

OCBC Bank (Malaysia) Bhd v. Lim Hock Kok & Anor [2017] 9 CLJ 454 CA ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 68(1)(a)

For the applicant - Leonard Yeoh, Chuah Chong Ping; M/s Tay & Partners
For the respondents - Viola De Cruz, Vinobha Anthony Doss; M/s V L DeCruz & Co

Reported by S Barathi

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JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This was a leave application pursuant to s. 68(1)(a) of the Courts of Judicature Act 1964 ("CJA 1964"). The Johor Bahru High Court, on
B 27 December 2018, had dismissed the applicant's application for an order of *certiorari* to quash the Johor Bahru Tribunal for Homebuyer Claims award dated 7 June 2018. Hence the instant application for leave to appeal.

[2] During the hearing of the leave application, a preliminary issue arose as to whether leave was indeed required or whether the parties could appeal
C as a matter of right. The applicant took the position that leave was not required. However, in view of the conflicting decisions of the courts and the practice directions issued by this court, the application for leave to appeal, we were told, was filed in the abundance of caution. The respondents, on the other hand, submitted that leave was required before an appeal can be filed
D as the value of the subject matter was less than RM250,000 as prescribed under s. 68 of the CJA 1964.

[3] After hearing the parties and taking into consideration the written submissions, we decided that leave to appeal was not required against the order of the High Court. We now provide our reasons which will constitute
E the judgment of the court.

Brief Background

[4] The facts leading to the application for judicial review can be stated briefly as follows. The second respondent purchased a condominium unit
F identified as 11-A-3402 in a housing development known as Country Garden Danga Bay from the developer, the applicant here, for a purchase price of RM1,639,861. Upon delivery of vacant possession, the second respondent discovered that the unit he had agreed to purchase was not the same one that was handed over to him. The second respondent complained to the applicant
G but to no avail.

[5] On 2 January 2018, the second respondent filed a claim with the Tribunal for Homebuyer Claims at Johor Bahru (first respondent) claiming that the applicant had delivered the wrong unit and that therefore there was a breach of the sale and purchase agreement. He claimed for the sum of
H RM50,000. On 7 June 2018, the first respondent allowed his claim and the award was for the applicant to pay the second respondent the sum of RM50,000.

[6] Aggrieved with this decision, the applicant, on 3 July 2018, filed for judicial review against the first respondent's decision. However, on
I 27 December 2018, the High Court dismissed the applicant's judicial review application with costs of RM6,000. On 9 January 2019, a notice of appeal

against the High Court decision dismissing the judicial review was filed without leave. On 23 January 2019, the applicant filed the instant notice of motion seeking leave to appeal, as they had said, in the abundance of caution.

The Instant Application

[7] Applications for leave to appeal to the Court of Appeal are governed by s. 68(1)(a) of the CJA 1964 which effectively states that no appeal shall be brought to the Court of Appeal when the amount or value of the subject-matter of the claim (exclusive of interest) is less than RM250,000, except with the leave of the Court of Appeal.

[8] Where appeals are filed without leave having been obtained, and where leave is required, the court has no jurisdiction to hear the appeal (see *Harcharan Singh Sohan Singh v. Ranjit Kaur S Gean Singh* [2011] 3 CLJ 593 ("*Harcharan Singh*")). The requirement for leave serves as a filter against frivolous or unmeritorious proceedings (*O'Reilly v. Mackman* [1983] 2 AC 237). It must follow that no appeal can be filed against the decision of the Court of Appeal regarding leave as otherwise the filter principle would be defeated (*Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 1 CLJ 1; [2000] 1 MLJ 129 ("*Lam Kong*")).

[9] Apart from s. 68 of the CJA 1964, there were initially two practice directions of the Court of Appeal which dealt with the question of leave. These were the Court of Appeal Practice Direction No. 2 of 1996 ("PD 1996") and Practice Direction No. 1 of 2008 ("PD 2008") which provided, among others, that no prior leave of the Court of Appeal under s. 68(1)(a) of the CJA 1964 is required for an appeal concerning a *certiorari* against the decision from a *quasi*-judicial body involving natural justice.

[10] The application of these practice directions came to be considered in the dissenting judgment of Mohd Hishamudin JCA in *Galaxy Energy Technologies Sdn Bhd v. Timbalan Pemungut Duti Setem, Malaysia & Anor* [2011] 5 CLJ 829; [2011] 5 MLJ 145 ("*Galaxy Energy*"). His Lordship held that PD 1996 and PD 2008 were mere guidelines and should be interpreted as being subject to the CJA 1964. His Lordship was of the view that the items pertaining to cases of *certiorari* in both the Practice Directions were meant to apply only to *certiorari* cases in respect of subject-matters that had no value attached to them or those with values that could not be quantified.

[11] In coming to this view, His Lordship relied on the decision of this court in *Lam Kong*, *supra* which was subsequently adopted by this court in the case of *Harcharan Singh*, *supra*, that the declarations as described in item (ii) of PD 1996 are those that relate to subject matters which either do not have any value attached to them or its value cannot be quantified.

[12] Be that as it may, it is noteworthy that the majority of the panel in *Galaxy Energy* (*supra*) (Zaleha Zahari and Abu Samah Nordin JJCA), after hearing submissions on the preliminary issue, ruled that no prior leave under s. 68(1)(a) of the CJA was required for the purpose of the appellant's appeal in that case.

[13] Since those aforementioned cases were decided, PD 1996 was revoked by PD 2008 whereas PD 2008 was revoked by this court's recent Practice Direction No. 1 of 2017 ("PD 2017"). The difference now is that the brief descriptions found earlier in PD 1996 and PD 2008 with respect to the matters for appeal do not appear in PD 2017. Even so, it is still explicitly stated in PD 2017 that matters that do not require leave to appeal are, among others, *certiorari.*

[14] In this respect, it is axiomatic that practice directions, as the name suggests, are issued by the courts to supplement the existing rules and to regulate the procedural practice of solicitors in their dealings with the courts, and in the filing of cause papers or documents. Practice directions are created and issued to streamline the court process and enhance efficiency of the same.

[15] In *Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 3 CLJ 357; [2002] 4 MLJ 145, Siti Norma Yaakob JCA (as Her Ladyship then was) observed (at p. 363 (CLJ); p. 150 (MLJ)):

> Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason, they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail.

[16] In similar vein, this court in *OCBC Bank (Malaysia) Bhd v. Lim Hock Kok & Anor* [2017] 9 CLJ 454, through the judgment of ldrus Harun JCA, noted (at p. 459):

> ... One thing seems to be clear, that is, that judicial authorities show that practice directions are effected for administrative purposes, but it is trite that once practice directions have been properly and legally issued, they must be complied with ...

[17] So, it can be surmised that as long as the practice directions are not contrary to any written law, they must be complied with. If the practice directions are disregarded willy-nilly, there may arise confusion and even disorder in the management of caseloads in the courts. So to say they are there for mere guidance is quite inaccurate.

[18] Now, it is pertinent to observe that the cases of *Lam Kong* (*supra*) and *Harcharan Singh* (*supra*) were not concerned with a leave application for matters concerning judicial review such as *certiorari*. They were concerned with declarations. The case of *Galaxy Energy* (*supra*), however, concerned an application for *certiorari*.

[19] In our view, cases concerning judicial review and *certiorari* should be considered on a different footing as it is an important process to review executive and legislative actions. It provides the checks and balances which are imperative in the separation of powers. In this way, the courts can review an administrative or *quasi*-judicial decision by a public authority. In our view, the value of the subject matter as stated in s. 68 of the CJA 1964 was really intended for cause of actions founded on tort or contract or other claims based on equity and not for matters concerning judicial review.

[20] So, it is really irrelevant as to whether the amount involved in the administrative action is RM50,000 or RM50 million. To think otherwise would place a man with less means in a worse position than one with more or much more. If at all a filter is necessary to prevent frivolous or unmeritorious appeals, it may be more appropriate to consider whether such appeals meet the test of real prospect of success rather than the arbitrary threshold of the value of the claim.

Conclusion

[21] In the circumstances, and for the reasons we have provided, we agreed with the majority view in *Galaxy Energy* (*supra*) and came to the conclusion that no prior leave under s. 68(1)(a) of CJA 1964 was required for the purpose of the appeal. After our pronouncement, the applicant withdrew its application for leave and the motion was struck out with no order as to costs.